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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 48

PACIFIC STATES BOX AND BASKET COMPANY,
APPELLANT,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE
FOR THE STATE OF OREGON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON

FILED MAY 9, 1935.

SUPREME COURT OF THE UNITED STATES

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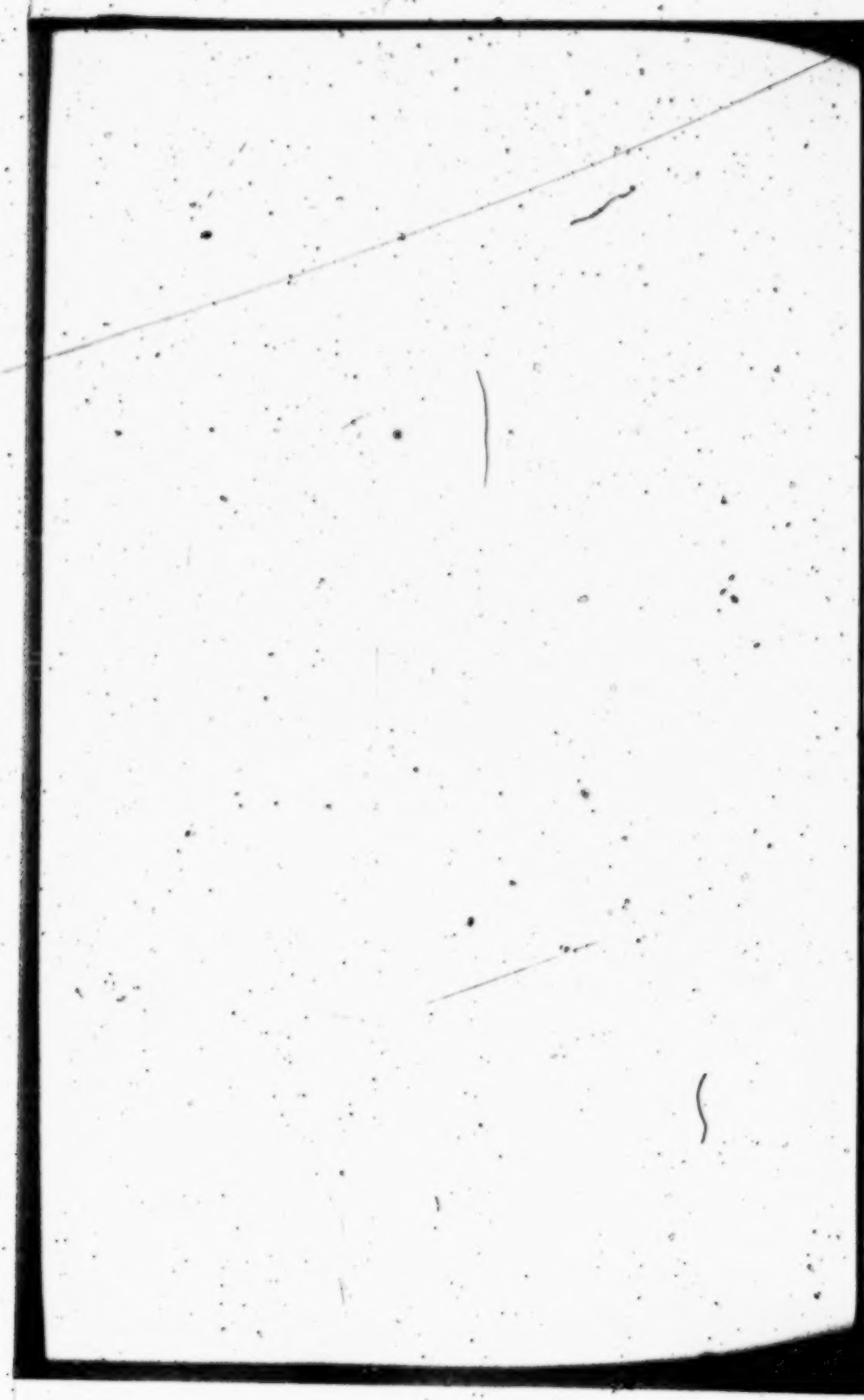

[fols. a & 1-4] Citation in usual form showing service on Willis S. Moore, filed March 23, 1935, omitted in printing.

[fol. 5]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. E-9443

In Equity

PACIFIC STATES BOX AND BASKET COMPANY, a California Corporation, Plaintiff,

vs.

MAX GEHLHAR as Director of Agriculture for the State of Oregon, and CHAS. A. COLE as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, Defendants

AMENDED BILL OF COMPLAINT—Filed June 28, 1934

Comes now Plaintiff above named and by consent of Defendants, herewith files its Amended Bill of Complaint and for cause of suit against the Defendant Max Gehlhar as Director of Agriculture for the State of Oregon, and Defendant Chas. A. Cole as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, complains and alleges as follows:

I

Plaintiff herein, Pacific States Box and Basket Company, now is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen of the State of California. Plaintiff is engaged in the business of manufacturing and selling fruit and vegetable boxes, baskets and cups and is the owner and operator of three plants, one known as the Florin Basket plant, located at Florin, California, one known as the Los Angeles Basket plant, located in Los Angeles, California, and one known as the Weston Basket and Barrel plant, located in San Francisco, California.

II

Defendant Max Gehlhar is the duly appointed, qualified and acting Director of Agriculture of the State of Oregon, and as such is vested with authority to perform the duties of said office as described in Chapter 136 Oregon Laws of 1931, and acts amendatory thereof, and said Defendant Max Gehlhar is the official of the State of Oregon referred to as "the director" and is the official charged with the enforcement of the orders and regulations of the Oregon State Department of Agriculture, and said Defendant Max Gehlhar is a citizen and a resident of the State of Oregon. [fol. 6] Defendant Chas. A. Cole is the duly appointed, qualified and acting Division Chief of the Division of Plant Industry of the State Department of Agriculture of the State of Oregon and as such is charged with making certain orders and regulations affecting standard containers for fruits and vegetables, which orders and regulations are subject to the approval of Defendant Max Gehlhar as Director of Agriculture. That Defendant Chas. A. Cole is a citizen and resident of the State of Oregon.

III

This is a suit of a civil nature, in equity, and is brought to enjoin the enforcement of a certain order or regulation dated May 3, 1933, entitled "Standard Containers for Fruits and Vegetables" made by Defendant Chas. A. Cole in his capacity as Chief of the Division of Plant Industry and approved by Defendant Gehlhar as Director of Agriculture, insofar as said order or regulation relates to containers for strawberries and raspberries, a copy of said order being attached hereto and made a part hereof as Exhibit A; and to enjoin the enforcement of a certain order or regulation dated June 1, 1933, entitled "Oregon Standards for Strawberries (1933)" made by Defendant Chas. A. Cole in his capacity as Chief of the Division of Plant Industry and approved by Defendant Gehlhar as Director of Agriculture, insofar as said order or regulation relates to containers for strawberries, a copy of said order being attached hereto and made a part hereof as Exhibit B, and to enjoin the enforcement of Sec. 18-2902 and Sec. 18-2911, Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, as these sections purport to sustain the above mentioned orders, Exhibit A and Exhibit B, and make the vio-

lation thereof unlawful and punishable, and, as more particularly hereinafter set forth, this suit arises under the Constitution and the laws of the United States, and the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

IV

That Section 18-2902, Oregon Code of 1930, provides as follows: "In order to promote, protect, further and develop the horticultural interests of this state, the Board is hereby authorized and empowered, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all horticultural products grown or produced in this state and to fix and promulgate official standards for containers of horticultural products and to [fol. 7] change any of them from time to time." The Board referred to in said Section was the Oregon State Board of Horticulture. That Section 18-2911 of said 29th Chapter of Title 18 of Oregon Laws of 1930 provides among other things as follows: "Whenever any standard for a container for any horticultural product becomes effective under this act, no person thereafter shall pack for sale, offer for sale, consign for sale, or sell and deliver, in a container, any such horticultural product to which the standard is applicable, unless the container conforms to the standard, subject to such variations therefrom as may be allowed in the regulations made under this act. * * * Any person violating this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars ($100) or be imprisoned not more than one year or both." That under the provisions of Chapter 136 Oregon Laws of 1931, all of the functions of the Oregon State Board of Horticulture were taken over by the State Department of Agriculture which department, it is provided, shall be under the control of an executive officer to be known as Director of Agriculture and the Defendant Max Gehlhar now is said Director of Agriculture for the State of Oregon. That Section 225 of Oregon Laws of 1933 relates to the labeling and packing of fruits and other horticultural products and to their containers. Sub-division 1 of Section 1 of said Act defines packing as meaning placing of fruits, vegetables and/or other horticultural products in a container preparatory for moving, offering for sale or

selling. Sub-section 2 of Section 1 defines the word "Container" but does not define nor use the word "hallock". Section 3 of said Act provides that it shall be unlawful for any person, firm, association or corporation to sell, offer for sale or transportation, or to transport within the State of Oregon any fruits, vegetables and/or other horticultural products for which the department of agriculture of the State of Oregon has established grades and regulations, unless such fruits, vegetables and/or other horticultural products have been graded and packed in conformity with such grades and regulations. Section 8 of such Act provides that a person, firm or corporation who violates the act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by fine or imprisonment, or both.

V

That under the assumed and alleged authority of the above statutory provisions, the orders and regulations hereinabove referred to, which are attached hereto and made a part hereof as Exhibit A and Exhibit B, were promulgated [fol. 8] by Defendant Chas. A. Cole in his official capacity as hereinabove mentioned, and approved by Defendant Max Gehlhar in his official capacity as hereinabove mentioned, and said Defendants have taken steps to enforce said orders, at least insofar as raspberries and strawberries are concerned, and have warned Oregon dealers not to use the tin top cup or basket which is the type of container manufactured and sold by Plaintiff, and have advised Plaintiff that such cups or baskets are not legal in Oregon.

VI

Plaintiff now is and for many years has been engaged in the business of manufacturing in the State of California containers for strawberries and raspberries called tin or metal top cups or baskets. Said cups or baskets are made of two thin strips of wood crossing each other to form the bottom of the containers and then bent upward to form the sides, reinforced with a narrow metal strip at the top to insure protection of the basket and its contents, as well as to insure uniformity of cubic measure. That said basket is made with an opening at each of the four corners so that the berries contained therein are amply ventilated, thus tending to prevent the berries from decaying and allowing the pur-

chaser to see the contents. That said baskets or cups manufactured by the Plaintiff do not have a false, raised, or set-up bottom. That the cubic measure of the baskets made by Plaintiff is one pint and is at least as great as that of the so-called hallock as described in the orders Exhibit A and Exhibit B as they relate to strawberries and raspberries, although the dimensions of the baskets or cups made by Plaintiff differ from the dimensions set out in the orders Exhibit A and Exhibit B. That the manner of packing strawberries and raspberries in metal top baskets or cups as described above is conducive to the preservation of the berries contained therein, to honest measurements, and to fair dealing with purchasers.

VII

That for the past nine years, Plaintiff has sold strawberry and raspberry baskets or cups of its own manufacture, and as described above, to dealers in the State of Oregon, in large quantities, for ultimate use as containers for strawberries and raspberries; that such berry baskets or cups are commonly known as tin-top berry baskets or cups, by reason of their being bound at the top with a metal frame, and such baskets or cups are in general and common use throughout the United States. That the right to continue to sell such tin-top berry baskets or cups to dealers in [fol. 9] the State of Oregon is of great value to Plaintiff, far exceeding in amount the sum of $3,000.00. That Plaintiff also sold a very large number of said baskets or cups to dealers in California for packing strawberries and raspberries for sale in Oregon.

VIII

That notwithstanding the facts above alleged, on or about May 3, 1933, the said order establishing Standard Containers for fruits and vegetables, Exhibit A hereof, was made and promulgated by Defendant Chas. A. Cole in his official capacity and approved by Defendant Max Gehlhar as Director of Agriculture and on or about June 1, 1933, the said order establishing Oregon standards for strawberries, Exhibit B hereof, was made and promulgated by Defendant Chas. A. Cole in his official capacity, and approved by Defendant Max Gehlhar as Director of Agriculture. Said orders were made and promulgated arbitrarily, capri-

ciously and unlawfully in that said orders limit the type of strawberry containers to so-called hallocks 2½ by 4⅜ by 4⅜ inches, outside measurements, bottom of hallock set up ¾ inch, inside depth 1¾ inches, and limit the type of raspberry containers to so-called hallocks 2 by 5¼ by 5¼ inches, outside measurements, bottom set up ¾ inch, inside depth 1¼ inches; that said orders and regulations exclude any other type of cup or container for strawberries or raspberries, even though other types of containers or cups may contain the same amount of berries and provide the same or better protection for said fruit. That the effect of said orders is to prevent the sale by Plaintiff and other manufacturers of the metal top variety of containers or cups with the solid bottom, even though said baskets or cups have at least as great cubic measure as the containers specified in the orders or regulations set forth as Exhibit A and Exhibit B hereof. That the machinery of Plaintiff cannot manufacture the type of baskets or hallocks described in the above mentioned orders without expensive change. That the so-called "hallock" can only be made of spruce which is grown only in the Pacific Northwest. That the so-called hallock described in said orders Exhibit A and Exhibit B hereof is not the type of berry basket in general use throughout the United States, nor are the particular dimensions stated in the orders or regulations, Exhibit A and Exhibit B, recognized as generally standard. That there is no necessity for the particular orders relating to strawberries or raspberries as set forth in Exhibit A and Exhibit B based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police [fol. 10] power, and the particular container described as a hallock of the size and kind provided for strawberries and raspberries in said orders Exhibit A and Exhibit B does not of necessity promote, protect, further or develop the horticultural interests of the State of Oregon. That the term "hallock" is not generally known nor can it be found in any standard dictionary.

IX

That the necessary effect of the said orders Exhibit A and Exhibit B is to grant a monopoly to the manufacturers of the so-called hallocks described in said orders and to prevent the sale of the type of strawberry or raspberry baskets

or cups manufactured by Plaintiff and others as hereinabove described, because dealers who formerly purchased such baskets from Plaintiff have been warned by officials of the State Department of Agriculture that they would not be allowed to sell strawberries or raspberries in any container other than the standard containers for strawberries and raspberries described in said orders in the State of Oregon during the season of 1934 or thereafter.

X

That section 3 of Chapter 225, Oregon Laws of 1933, provides that after a standard for a container has been adopted that it shall be unlawful to sell horticultural products, which includes strawberries and raspberries, which are packed in any container other than such standard containers, or to sell strawberries or raspberries in Oregon, no matter where packed, if in containers other than the standard, and the violation of such statute is made a misdemeanor punishable by fine and imprisonment.

XI

That the said orders made by Defendant Cole and approved by Defendant Gehlhar, dated respectively May 3, 1933, and June 1, 1933, and designated respectively "Standard Containers for Fruits and Vegetables" and "Oregon Standards for Strawberries (1933)", Exhibits A and B hereof, insofar as they relate to containers for strawberries or raspberries are unlawful and void for the following among other reasons:

1. Said orders are void because they deprive plaintiff of its property without due process of law, in violation of the provisions of the Constitution of the United States, particularly the provisions of Section 1 of the 14th Amendment of said Constitution, in that the type of baskets made by Plaintiff and herein above described cannot be used for packing strawberries or raspberries for sale in the State of [fol. 11] Oregon without making the users liable to arrest and subject to fine and imprisonment. Said orders arbitrarily interfere with the legitimate business of Plaintiff and have the effect of prohibiting it from selling its berry baskets to Oregon dealers, or to California dealers who desire to sell strawberries or raspberries in Oregon, all as more particularly set forth above.

2. Said orders are void because they deny to Plaintiff the equal protection of the laws in violation of the Constitution of the United States, particularly the provisions of Section 1 of the 14th Amendment of said Constitution. The orders grant a monopoly to manufacturers of so-called hallocks that are described in the said orders and that can only be made of spruce which is produced in the Northwest, and make illegal the sale of strawberries or raspberries in baskets or cups of a different type, manufactured by Plaintiff, even though such baskets adequately protect the contents, constitute honest measurement, and have no tendency to deceive the public, with the same cubic content as is provided in said orders. Said orders are unreasonably discriminatory in favor of the so-called hallock described in the orders and against the tin top baskets or cups made by Plaintiff, all as more particularly set forth above.

3. Said orders are void for the reason that they interfere with and impose unlawful burdens on the interstate commerce and business of Plaintiff, contrary to and in violation of the provisions of subdivision 3 of Section 8 of Article 1 of the Constitution of the United States. Plaintiff is prevented by said orders from obtaining orders from dealers in Oregon for baskets manufactured by it in California. A substantial part of Plaintiff's interstate business is cut off by the discriminatory character of said orders as they relate to strawberry and raspberry containers. That said orders were arbitrarily made by the Defendants, and have the effect of legislation which arbitrarily and unjustly discriminates against products made in another state.

XII

That the season for the sale of strawberries and raspberries is now at its height in Oregon and because of the threatened enforcement of said orders, Exhibit A and Exhibit B hereof, by Defendants and officials working under them, Plaintiff is losing valuable business each day, which but for said orders it would be receiving. That Plaintiff will continue to lose business and will lose and is losing its regular customers, unless and until the enforcement of said [fol. 12] orders Exhibit A and Exhibit B, insofar as they relate to strawberries and respberries, is restrained. That Plaintiff's property and business will suffer irreparable injury and damage through the loss of its customers and sales

unless the Defendants, and their agents, representatives and attorneys, are forthwith restrained and enjoined from the enforcement of said orders insofar as they relate to strawberry and raspberry containers.

XIII.

Plaintiff has no plain, speedy or adequate remedy at law against or on account of such injury and damage and Plaintiff is wholly without remedies except through the interposition of the equity jurisdiction of this Court.

Wherefore, Plaintiff herein prays:

(1) For a temporary restraining order herein enjoining and restraining Defendants, their successors in office, attorneys and agents, and all persons acting or purporting to act under their authority or the authority of either of them, until the hearing and determination of the application of Plaintiff for an interlocutory injunction as herein prayed for, from enforcing or taking any steps to enforce the said order entitled "Standard Containers for Fruits and Vegetables" dated May 3, 1933, Exhibit A hereof, and the order entitled "Oregon Standards for Strawberries (1933)", dated June 1, 1933, Exhibit B hereof, insofar as said order relates to containers for strawberries, and from notifying any dealer or producer in the State of Oregon that the use of the strawberry containers made by Plaintiff will be prevented or from in any way interfering with the use of said containers by dealers or producers in Oregon, and enjoining and restraining the enforcement of Section 18-2902 and Section 18-2911, Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, as these sections purport to sustain the above mentioned orders, Exhibit A and Exhibit B, and make the violation thereof unlawful and punishable.

(2) For an interlocutory injunction herewith restraining the Defendants, their successors in office, attorneys and agents, and all persons acting or purporting to act under their authority or the authority of either of them, until the final determination of this suit upon the merits, from enforcing or taking any steps to enforce the said order entitled "Standard Containers for Fruits and Vegetables" dated May 3, 1933, Exhibit A hereof, and the order en-

titled "Oregon Standards for Strawberries (1933)", dated [fol. 13] June 1, 1933, Exhibit B hereof, insofar as said orders relate to containers for strawberries or raspberries, and from notifying any dealer or producer in the State of Oregon that the use of the raspberry or strawberry containers made by Plaintiff will be prevented or from in any way interfering with the use of said containers by dealers or producers in Oregon, and enjoining and restraining the enforcement of Section 18-2902 and Section 18-2911, Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, as these sections purport to sustain the abovementioned orders, Exhibit A and Exhibit B, and make the violation thereof unlawful and punishable.

(3) For a final decree setting aside, vacating and adjudging null and void and of no force and effect the said order entitled "Standard Containers for Fruits and Vegetables" dated May 3, 1933, Exhibit A hereof, and the order entitled "Oregon Standards for Strawberries (1933)" dated June 1, 1933, Exhibit B hereof, insofar as said orders relate to containers for strawberries or raspberries, and perpetually enjoining and restraining said Defendants, their successors in office, attorneys and agents, and all persons acting or purporting to act under their authority or the authority of either of them, from enforcing or attempting to enforce the said orders.

(4) For judgment for Plaintiff's costs and disbursements herein.

(5) For such other and further relief as may be just and equitable.

Arthur A. Goldsmith, Hanna and Morton, Byron C. Hanna, Solicitors for Plaintiff.

EXHIBIT "A" TO AMENDED BILL OF COMPLAINT

STANDARD CONTAINERS FOR FRUITS AND VEGETABLES

As provided for in sections 18-2902 and 18-2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, a public hearing was held in Portland, Oregon, on the date of April 15, 1933, to consider standard containers for fruits and vegetables. Containers for the following fruits and vegetables were considered and recommended:

Apricots

Yakima Lug—4 inches deep, 11 inches wide, and 15⅛ inches long, all inside measurements.

L. A. Lug—5¾ inches deep, 13½ inches wide and 16⅛ inches long, all inside measurements.

Asparagus

Crate—10½ inches deep, 18½ inches long, top 8 inches wide, bottom 10½ inches wide, all inside measurements.

Cantaloups

Flat Crate—4½ inches deep, 13½ inches wide, and 22⅛ inches long, all inside measurements.

Pony Crate—11 inches deep, 11 inches wide, and 22⅛ inches long, all inside measurements.

Standard Crate—12 inches wide, 11½ inches deep, and 22⅛ inches long, all inside measurements.

Jumbo Crate—13 inches deep, 13 inches wide, and 22⅛ inches long, all inside measurements.

Cauliflower

Crate—8½ inches deep, 18 inches wide, and 22⅜ inches long, all inside measurements.

Cherries

L. A. Lug—5¾ inches deep, 13½ inches wide, and 16⅛ inches long, all inside measurements.

Box—4⅛ and 4¼ inches deep, 8⅝ inches wide, and 17¼ inches long, all inside measurements.

This container may be packed with or without a ⅜ inch center partition.

10 Pound Box—2¼ inches deep, 9 inches wide, and 18 inches long, all inside measurements.

Grapes

L. A. Lug—5¾ inches deep, 13½ inches wide, and 16⅛ inches long, all inside measurements.

U. S. Standard 4-quart climax basket. Bottom of basket 12x4½ inches, top 14x6¼ inches, height 4-11/16 inches, all outside measurements.

Peach

Box—3½, 4, 4½, 5, 5½ and 6 inches deep, 11½ inches wide, and 18 inches long, all inside measurements.

Peas

Box—9½ inches deep, 12 inches wide, 19⅝ inches long, all inside measurements.

Hamper—32-quart Federal standard hamper.

Bag—30-pound sack or bag.

Prunes

Basket—U. S. standard half bushel basket, (tub or round stave).

Display Lug—3⅜ inches deep, 10½ inches wide, and 15 inches long, inside measurements. A one-half inch cleat to be used on top of ends.

Raspberries

Crate—24-pint hallocks, 5⅛ inches deep, 16⅝ inches wide, and 23¼ inches long, all inside measurements. Center partition ¾ inches, ends and partition grooved for double deck. Size of hallock, 2x5¼x5¼ inches, outside measurements. Bottom set up ¾ inch, inside depth 1¼ inches.

Strawberries

Crate—24-pint hallocks, 6⅜ inches deep, 13¾ inches wide, and 19¼ inches long, all inside measurements. Half inch center piece. Size of hallocks 2½x4⅜x4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches.

Tomato

Box—3½, 4, 4½, 5, 5½ and 6 inches deep, 11½ inches wide, and 18 inches long, all inside measurements.

L. A. Lug—5¾ inches deep, 13½ inches wide, 16⅛ inches long, all inside measurements.

Vegetable Crate

Crate—13 inches deep, 18 inches wide, and 21⅝ inches long, all inside measurements. This crate is standard for lettuce, beets, turnips, carrots, cabbage, spinach.

As provided by sections 18-2902 and 18-2903; Oregon Code 1930, and chapter 136, Oregon Laws, 1931, the above mentioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of time until January 1, 1934, in order to make use of such material.

Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this the third day of May, 1933. I hereby designate the Department of Agriculture Bulletin as the publication in which said Order shall be published.

Charles A. Cole, Division Chief. Approved: Max Gehlhar, Director of Agriculture.

EXHIBIT "B" TO AMENDED BILL OF COMPLAINT

OREGON STANDARDS FOR STRAWBERRIES (1933)

Department of Agriculture, State of Oregon

Division of Plant Industry

Grades

U. S. No. 1 shall consist of strawberries of one variety, with the cap (calyx) attached, which are firm, not overripe, underripe, or undeveloped; and which are free from mold or decay and from damage caused by dirt, moisture, foreign matter, disease, insects, or mechanical or other means. UNLESS OTHERWISE SPECIFIED the minimum size shall be not less than three-quarters of an inch in diameter.

In order to allow for variations, other than size incident to proper grading and handling, not more than 10 per cent, by volume, of the strawberries in any lot may be below the requirements of this grade, but not to exceed one-half of this tolerance, or 5 per cent, shall be allowed for defects causing serious damage, and not more than one-fifth of this amount, or 1 per cent, shall be allowed for decay.

In addition, not more than 5 per cent, by volume, of the strawberries in any lot, may be below the specified minimum size.

U. S. No. 2 shall consist of strawberries which are free from decay and from serious damage caused by disease, insects, mechanical or other means. UNLESS OTHERWISE SPECIFIED the minimum size shall be not less than five-eighths of an inch in diameter.

In order to allow for variations other than size incident to proper grading and handling, not more than a total of 10 per cent, by volume, of the strawberries in any lot shall be allowed for defects causing serious damage but not to exceed three-tenths of this amount, or 3 per cent, shall be allowed for strawberries affected by decay.

In addition, not more than 5 per cent, by volume, of the strawberries in any lot may be below the specified minimum size.

Cull Grade: Strawberries not meeting the requirements of the foregoing grades shall be marked cull strawberries.

Definitions of Terms as Used in These Grades

Overripe means dead ripe, becoming soft, a condition unfit for shipment and necessitating immediate consumption.

Underripe means so immature that less than two-thirds of the surface of the berry is of a pink or red color.

Undeveloped means not having attained a normal shape and development owing to frost injury, lack of pollination, insect injury, or other causes. "Button" berries are the most common type of this condition.

Damage means any injury from the causes mentioned which materially affects the appearance, edible or shipping quality.

Serious damage means that the strawberries are soft, badly deformed, badly bruised, leaky, or otherwise seriously injured. Strawberries which are caked with dirt or which show no pink or red color shall be considered seriously damaged.

Diameter means the greatest dimension at right angles to a straight line running from the stem to the apex.

Package: The 24-pint hallock crate is the standard crate for strawberries. Size of crate, 6⅜ inches deep by 13¾ inches wide by 19¼ inches long, all inside measurements, with ½-inch center piece. Size of hallock shall be 2½ by 4⅜ by 4⅜ inches, outside measurements. Bottom of hallock set up ¾ inch, inside depth 1¾ inches.

Packing: The hallocks shall be well filled without undue air spaces. The net weight of the berries in each hallock shall be not less than 12 ounces.

Marking the Crate: The crates shall be marked on one end in a legible manner, in letters and figures of not less than ⅜-inch in height and not less than 3/16-inch in width, with the following information: Number of hallocks in crate, net weight of berries in hallock, grade and variety of berries and name and address, or brand, of the grower, shipper or packer, as the case may be. If the required markings do not show on the label they shall be stamped on the labeled end of the crate, or if no label is used, on one end of the crate as illustrated below:

TOP

24 12-ounce hallocks U. S. No. 1 Marshall Strawberries

LABEL

John Doe
Banks, Oregon

The foregoing grades and standards, as amended June 1, 1933, shall become effective July 15, 1933.

Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this, the 1st day of June, 1933.

Chas. A. Cole, Division Chief. Approved: Max Gehlhar, Director.

[fols. 14 & 15] *Duly sworn to by Herman Paine. Jurat omitted in printing.*

[File endorsement omitted.]

[fols. 16 & 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION TO FILE AMENDED BILL OF COMPLAINT—Filed June 15, 1934

It is hereby stipulated by and between the parties hereto acting through their respective solicitors, as follows:

1. Plaintiff may file an Amended Bill of Complaint, an unverified copy of which is attached hereto;

2. Defendants' Motion to Dismiss, filed on or about June 13, 1934, shall be considered a motion to dismiss the Amended Bill instead of the original Bill, and the motion to dismiss the Amended Bill will be argued before the Court of three judges on June 28, 1934;

3. The temporary restraining order heretofore issued shall remain in effect strictly in accordance with its terms, and shall not be deemed extended or its effect altered by this stipulation nor by the filing of the proposed Amended Bill;

4. Plaintiff's application for an interlocutory injunction as prayed for in the proposed Amended Bill will be argued before the said three judge Court on June 28, 1934;

It is further stipulated that service of a copy of the Amended Bill on the Attorney General shall be sufficient without the necessity of serving Defendants.

Dated June 15, 1934.

Arthur A. Goldsmith, Byron C. Hanna, Hanna & Morton, Solicitors for Plaintiff. I. H. Van Winkle, Willis S. Moore, Solicitors for Defendants.

[File endorsement omitted.]

[fols. 18 & 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed June 13, 1934

Come now the above named defendants, and move the court for an order dismissing plaintiff's bill of complaint herein, upon the grounds and for the reason:

1. That said bill of complaint does not state facts sufficient to entitle the complainant to the relief therein demanded, and that there is no equity in the bill.

I. H. Van Winkle, Attorney-General; Willis S. Moore, Assistant Attorney-General, Attorneys for Defendants.

STATE OF OREGON,
County of Marion, ss:

Due service of the within Motion to Dismiss by receiving a copy thereof duly certified as such by Willis S. Moore, one of the Attorneys for the Defendants, is hereby admitted in Multnomah County, Oregon, this 13th day of June, 1934.

Arthur A. Goldsmith, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HERMAN PAINE—Filed May 31, 1934

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Herman Paine, being first duly sworn, deposes and says: That he is the President of the Pacific States Box and Basket Company, the plaintiff herein, and makes this affidavit on its behalf in support of its renewed application for the issuance of a temporary restraining order in the above entitled suit; that neither the officers nor any representatives or agents of the plaintiff corporation were present at or had any knowledge or notice of proceedings for the establishment of standard strawberry containers for the State of Oregon; that the first notice to plaintiff, or to any of its officers or agents, of the promulgation or enactment of the orders or regulations complained of in the above entitled suit was on or about the 4th day of April, 1934, when plaintiff received, at its Western Basket and Barrel Plant, a copy of a printed pamphlet containing the said regulations; that said pamphlet did not disclose the intention of defendants to prohibit the sale of strawberries in the State of Oregon in containers or types other than the Hallock type described in said pamphlet as standard;

That on the 4th day of April, 1934, the plaintiff corporation, through its Western Basket and Barrel plant, addressed and forwarded a letter to the defendant Cole, a copy of

which is attached hereto, asking what other types of strawberry containers were standard in the State of Oregon; that on or about April 9, 1934 plaintiff received in reply the letter attached hereto, erroneously addressed to "Weston Basket and Barrel Co.", dated April 6, 1934 and signed by the defendant Cole as Chief of the Division of Plant Industry of the Department of Agriculture of the State of Ore-
[fol. 21] gon; that thereafter plaintiff sought to obtain a definite ruling from the said Department of Agriculture as to the interpretation by said department of the regulations complained of with respect to the marketing of strawberries in the State of Oregon in metal top strawberry baskets or cups of the type manufactured and sold by the plaintiff corporation, and to that end addressed and forwarded to said Department of Agriculture a letter dated April 9, 1934, directed to the attention of the defendant Cole, a copy of which is attached hereto, in which letter plaintiff corporation pointed out that the regulations complained of do not state that the Hallock basket is the only type of container which can be used for such purposes; that on April 11, 1934, plaintiff forwarded a telegram to defendant Cole asking for a reply to said letter of April 9, 1934, a copy of which telegram is attached hereto; that on or about April 15, 1934, plaintiff received the letter attached hereto, erroneously addressed to "Weston Basket and Barrel Co.", dated April 13, 1934, and signed by the defendant Cole; that on April 16, 1934 plaintiff forwarded a letter to the defendant Cole, dated April 16, 1934, a copy of which is attached hereto, and in reply to which plaintiff received the letter of April 20, 1934, attached to affiant's affidavit of May 24, 1934, heretofore filed;

That on April 16, 1934 affiant requested one Austin Chester, at Eugene, Oregon, to see defendant Cole on behalf of the plaintiff corporation and attempt to convince him of the injustice of the regulations complained of as theretofore interpreted by him; that on April 17, 1934 plaintiff corporation was advised by said Austin Chester that the defendant Cole would do nothing to permit the use of any container but the hallock type for the sale of strawberries in Oregon; that on April 18, 1934 affiant sent a telegram to said Austin Chester requesting a copy of the entire act under which the said regulations were adopted, and immediately upon receipt thereof, on April 20, 1934, delivered the

same to Byron C. Hanna, attorney at law, of Los Angeles, California; that the time intervening between April 20, 1934 and May 25, 1934 was taken up in the preparation of an opinion as to the validity of the regulations complained of and the preparation of the Bill of Complaint for filing with this Honorable Court.

Affiant here reaffirms each and every statement contained in his affidavit of May 24, 1934, filed in support of plaintiff's first application for a temporary restraining order; affiant further says that the first knowledge of or notice to plaintiff of any act of defendants toward the enforcement of the regulations complained of was on or about May 9, 1934, when [fol. 22] its Weston Basket and Barrel Plant received the two letters of May 7, 1934, from Ted's Feed and Seed Store of Ashland, Oregon, and F. E. Samson Co. of Medford, Oregon, respectively, attached as exhibits to affiant's said affidavit of May 24, 1934;

That the strawberry season in Oregon is now under way and will continue for at least one month; that orders for strawberry containers are being placed every day by dealers in the State of Oregon; that unless defendants are restrained, pending the hearing upon the Order to Show Cause heretofore issued, from enforcing the regulations complained of in the above entitled suit, plaintiff will suffer irreparable injury in the loss of the business of such dealers; that affiant prays that this Honorable Court issue a temporary restraining order upon the showing made by this affidavit.

Herman Paine.

Subscribed and sworn to before me this 29th day of May, 1934. Laura Teeter, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 23] EXHIBITS TO AFFIDAVIT OF HERMAN PAINE

"San Francisco, California,
April 4, 1934.

Mr. Chas. A. Cole, Division Chief,
Department of Agriculture,
State of Oregon, Salem, Oregon.

DEAR SIR:

We would be very pleased to have you send us by return of mail a copy of the law relating to the Standard Pint

Baskets and Crates that are allowed to be used in your State.

We have a copy of pamphlet entitled Oregon Standards for Strawberries (1933) Dept. of Agri. State of Oregon, Division of Plant Industry Grades, which specified that the Hallock Basket and Crate is a standard container, but what we would like is the information as to the other type of Pint Berry Baskets and Crates that are also standard in your State.

Your prompt reply will grealy oblige,

Yours very truly, Weston Basket & Barrel Plant.

HLH."

[fol. 24] "Max Gehlhar, Director.

Division of Plant Industry,
Chas. A. Cole, Division Chief.

Phone 4114

Department of Agriculture,

Agricultural Bldg.

Salem, Oregon, April 6, 1934.

Weston Basket & Barrel Co.,
813 Folsom Street,
San Francisco, California.

GENTLEMEN:

In reply to your letter of April 4th in regard to berry containers, we are herewith sending you standards for raspberries and blackberries.

Our regulations allow only one type of container for these small fruits.

Respectfully yours, (Signed) Chas. A. Cole, Division Chief.

CAC:H.
Enc."

[fol. 25] "April 9, 1934.

Department of Agriculture,
Salem, Oregon.

Attention: Mr. Charles A. Cole

GENTLEMEN:

We acknowledge receipt of your favor of the 6th enclosing pamphlets covering Oregon standards for berries and

note under the head of "Package" that the 24 pint hallock crate is the standard crate for strawberries and raspberries.

In your favor of the 6th you state that "our regulations allow only one type of container for these small fruits."

We understand that the hallock is a standard pint container. There are also 34 other styles or shapes of berry baskets that are standard pint containers approved by the United States Government Department of Agriculture for berries. We also understand that berries can be marketed regardless of the shape or size of the basket so long as it complies to the regulations covering cubical contents.

As we are a manufacturer of several styles of pint berry baskets we are very much interested in a definite ruling from your Department as to whether they can be used in the State of Oregon by Oregon growers. We do not see anything in your pamphlet which states that the 24 pint hallock must be used for strawberries—it simply states it is a standard crate for berries, while your letter says that you only allow one type of container for small fruits.

It is our opinion that any legislation designating one style of package forcing discrimination against other kinds of packages which conform with the Laws as to cubical contents is unconstitutional and cannot under any circumstances be enforced and we desire a definite ruling from your Department as to whether it is illegal to put stawberries in metal top standard one pint baskets and market in the State of Oregon.

Yours very truly, Weston Basket & Barrel Plant.
H. Hofstetter.

HH:HH."

[fol. 26] Postal Telegraph Blank

"Night Letter x #813 Folsom Street,
San Francisco, April 11, 1934.

Mr. Charles A. Cole,
Department of Agriculture,
Salem, Oregon.

Wire immediately advising whether you have mailed ruling as requested in our letter of April Ninth advising if metal top standard pint berry baskets for use in the State of Oregon are illegal.

Weston Basket & Barrel Plant.

Charge."

[fol. 27] "Max Gehlhar, Director.

Division of Plant Industry,
Chas. A. Cole, Division Chief.

Phone 4114

State of Oregon

Department of Agriculture

Department of Agriculture

Agricultural Building

Salem, Oregon

April 13, 1934.

Weston Basket & Barrel Co.,
813 Folsom Street,
San Francisco, California.

GENTLEMEN:

Your wire in regard to our standard berry crate and hallock was on my desk when I return- from a trip out of town; also your letter of April 9th acknowledging receipt of pamphlets covering grades.

If you will notice under heading "Package" our standard container is a 24 pint crate and the dimensions of this crate are given and also the dimensions of the hallock. You will also find a similar description in regard to raspberries under the heading "Package".

According to our law, it is illegal to market strawberries in Oregon in packages that do not conform to our regulations. The tin-top strawberry hallock is not standard in Oregon.

Respectfully yours, Chas. A. Cole, Division Chief.

CAC:H."

[fols. 28 & 29] "April 16, 1934.

Mr. Chas. A. Cole,
Department of Agriculture,
Salem, Oregon.

DEAR SIR:

We are in receipt of your letter of the 13th in reply to our wire of the 11th and letter of April 9th, and note you

state the TinTop strawberry baskets are not standard in Oregon.

We have your pamphlet which gives the specifications covering the standard hallock crate and basket. This does not give us a copy of the ruling which states the tintop strawberry baskets are illegal to be used in Oregon and would be pleased to have you send a copy of your Law covering same by return mail.

Yours very truly, Weston Basket & Barrel Plant.

HLH."

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING ON PLAINTIFFS, APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed June 15, 1934

To Honorable Julius L. Meier, Governor of the State of Oregon, and Honorable I. H. Van Winkle, Attorney General of the State of Oregon, and Defendants Max Gehlhar as Director of Agriculture for the State of Oregon, and Chas. A. Cole as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon:

You and each of you will please take notice that on Thursday, June 28, 1934, at 10 o'clock A. M. or as soon thereafter as counsel may be heard, at the United States District Court at Portland, Oregon, Plaintiff will apply to the statutory Court of three judges as provided in Section 266 of the United States Judicial Code as amended, for an interlocutory injunction restraining the above named Defendants, their successors in office, attorneys and agents and all persons acting or purporting to act under their authority or the authority of either of them until the final determination of this suit upon the merits, from enforcing or taking any steps to enforce that certain order entitled "Standard Containers for Fruits and Vegetables" dated May 3, 1933, Exhibit A of the amended Bill of Complaint, and the order en-

titled "Oregon Standards for Strawberries (1933)" dated June 1, 1933, Exhibit B of the Amended Bill of Complaint, insofar as said orders relate to containers for strawberries and raspberries, or respberries, and from notifying any dealer or producer in the State of Oregon that the use of the strawberry or raspberry containers made by Plaintiff will be prevented or from in any way interfering with the use of said containers by dealers or producers in Oregon, and enjoining and restraining the enforcement of Section 18-2902 and Section 18-2911, Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, as these sec- [fols. 31 & 32] tions purport to sustain the above mentioned orders, Exhibits A and B, and make the violation thereof unlawful and punishable.

In support of this application, Plaintiff refers to and will rely upon the verified Amended Bill of Complaint on file herein and on each and all of the allegations therein contained, and upon the affidavits of Herman Paine and such other affidavits as Plaintiff may serve on Defendants.

Arthur A. Goldsmith, Byron G. Hanna, Hanna and Morton, Solicitors for Plaintiff.

Dated June 15th, 1934.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Marion County, Oregon, on the 15th day of June, 1934.

J. L. Meier, B. W.

For Defendants, I. H. Van Winkle, Max Gehlar, Chas. A. Cole.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HERMAN PAINE—Filed June 26, 1934

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Herman Paine, being first duly sworn, deposes and says: That he is is the President of the Pacific States Box and

Basket Company, the plaintiff herein, and makes this affidavit on its behalf. Affiant here reaffirms each and every statement contained in the affidavits of May 24, 1934, and May 29, 1934, heretofore filed in the above entitled cause. That the tin top baskets and cups manufactured by the plaintiff corporation and sold by it to dealers in the State of Oregon and in Northern California for ultimate use in the State of Oregon, referred to in said affidavit of May 24, 1934, as "strawberry baskets or cups", are used by such dealers and others as containers not only for strawberries but also for raspberries, as appears from the attached letter of R. McElligott, proprietor of Mac's Seed and Feed Store of Grant's Pass, Oregon, dated April 2, 1934, and the attached telegram of Monarch Seed & Feed Co. of Medford, Oregon, dated June 13, 1934, and addressed to Angelo & Sons. That said letter of April 2, 1934, was received by the Weston Basket and Barrel plant of the plaintiff corporation on or about the 4th day of April, 1934; that Angelo & Sons is a corporation engaged in the manufacture and sale of tin top baskets and cups identical with those manufactured and sold by the plaintiff corporation, the entire capital stock of said [fol. 34] Angelo & Sons being wholly owned by the plaintiff corporation. That neither the officers nor any representatives or agents of the plaintiff corporation were present at or had any knowledge or notice of proceedings for the establishment of standard raspberry containers for the State of Oregon. That the first notice to plaintiff, or to any of its officers or agents, of the adoption of the order or regulation relating to raspberry containers complained of in the above entitled suit was on or about the 9th day of April, 1934 when plaintiff received the letter dated April 6, 1934, signed by the defendant Cole, annexed to the said affidavit of May 29, 1934; that thereafter the plaintiff and affiant took the steps and received and sent the communications set forth in affiant's said affidavit of May 29, 1934, at page 2, line 13, to page —, line 18, thereof. That the first knowledge of or notice to the plaintiff corporation of any intent on the part of the defendants to prohibit the sale of raspberries in the State of Oregon in such tin top baskets or cups was on the 13th day of June, 1934, when affiant was advised by plaintiff's counsel that on or about June 12, 1934, counsel for defendants had refused to advise his clients to refrain from enforcing the said regulation as to raspberry containers on

the temporary restraining order thereto- the above entitled court related only to the regulation establishing a standard container for strawberries; that affiant immediately instructed plaintiff's counsel to take steps toward enjoining the enforcement of said regulation relating to containers for raspebrries in the State of Oregon as far as it prohibited the use for such purposes of the tin top baskets or cups manufactured and sold by the plaintiff.

That the value to plaintiff of its established business in the sale of tin top baskets or cups to dealers in the State of Oregon for use as strawberry and raspberry containers is at least $50,000.00. That plaintiff's net receipts from sales during the years 1932 and 1933 of tin top baskets or cups to dealers in Oregon for use as strawberry and raspberry containers in the State of Oregon amounted to $6,699.62 after deducting allowances for freight to such dealers. That many such tin top baskets or cups were sold by the plaintiff corporation during the said years of 1932 and 1933 to dealers in the northern part of the State of California for ultimate use as containers of strawberries and raspberries in the State of Oregon, but the amount of net receipts from such sales is unknown to affiant and cannot [fol. 35] readily be ascertained.

That Hallock baskets of the types required by the regulations complained of in the above entitled suit as standard containers for strawberries and raspberries are made of rotary cut veneer, taken directly from spruce logs; that such spruce logs are not available at or near the plants of the plaintiff corporation and cannot be transported thereto except at prohibitive cost; that the cost of such transportation would be so high as to make the cost of manufacturing such Hallock baskets at the plants of the plaintiff corporation greater than the selling price in the State of Oregon of such Hallock baskets made by plaintiff's competitors who are now engaged in the manufacture thereof; that even if such spruce logs were readily and conveniently available at the plants of the plaintiff corporation, plaintiff would have to install a large amount of new machinery to enable it to manufacture such Hallock baskets in quantities equivalent to its average sales of tin top baskets or cups in the State of Oregon during the past two years; that such necessary machinery would cost at least $25,000.00 to install.

That the corporation has established a reputation in the State of Oregon as a manufacturer and seller of tin top baskets and cups; that the strawberry and raspberry season in the State of Oregon is now at its height; that orders for tin top baskets and cups for use as strawberry and raspberry containers are being placed every day by dealers in the State of Oregon; that unless defendants are restrained and enjoined pending the trial of the above entitled cause from enforcing the regulations therein complained of, plaintiff will suffer irreparable injury in the loss of the business of such dealers.

Herman Paine.

Subscribed and sworn to before me, this 15th day of June, 1934. Carrie R. Hammond, Notary Public in and for the County of Los Angeles, State of California.

[fol. 36] EXHIBITS TO AFFIDAVIT OF HERMAN PAINE

Mack's Seed and Feed Store

R. McElligott

Gill Bros. Seeds Sperry's Poultry and Dairy Feeds

514 So. 6th Street

Grants Pass, Oregon,
Apr. 2nd, 1934.

Sold to

Weston Basket & Barrel Co.,
San Francisco.

GENTLEMEN:

Replying to yours of March 24th.

The Berry crop and also the prospects for a fair price looks very favorable this year. However, there is a change in the law as you will see by enclosed pamphlet regarding the use of the Hallocks.

Do you make them if not where can I get them. We will of course use your Florin cups for Raspberries but the bulk of the crop is Strawberrys and it is going to make it hard

for a dealer to handle both varietys and harder still if we have to get our supplies from different services.

Yours truly, R. McElligott

[fols. 37 & 38] Western Union Blank

Faf40 53 Dl Collect Medford Org. 13 944A

1934 Jun 13 AM 10 03

Angelo & Sons-
398 Bay St-

This is to inform you that Florin Tin Top Berry Cups are being and have been used in this territory for years for Raspberries, Strawberries, Loganberries, Dewberries, Youngberries, Currants, and all bush or vine berries and have served the purpose equally as well as any substitute container ever to enter this field.

Monarch Seed & Feed Co.

[File endorsement omitted.]

[fol. 39] In United States District Court for the District of Oregon

E-9443

Pacific States Box and Basket Company, a California corporation, Plaintiff,

v.

Max Gehlhar, as Director of Agriculture for the State of Oregon, and Chas. A. Cole, as Chief of the Division of Plant Industry for the Department of Agriculture for the State of Oregon, Defendant

Arthur A. Goldsmith, Hanna & Morton, Byron C. Hanna for Plaintiff;

I. H. Van Winkle, Attorney General, Willis S. Moore, Assistant Attorney General.

Before Garrecht, Circuit Judge, and McNary and Fee, District Judges

Opinion—Filed Dec. 17, 1934

McNary, District Judge:

This is a suit to enjoin the defendants from enforcing orders of the Department of Agriculture of Oregon fixing

standard containers for strawberries and raspberries, made in pursuance of sections 18-2902 and 18-2911 of the Oregon Laws. The orders provide that the standard containers for such fruits shall be:

"Raspberries

Crate—24-pint hallocks, 5⅛ inches deep, 16⅝ inches wide, and 23¼ inches long, all inside measurements. Center partition ¾ inches, ends and partition grooved for double deck. Size of hallock, 2 x 5¼ x 5¼ inches, outside measurements. Bottom set up ¾ inch, inside depth 1¼ inches.

"Strawberries

Crate—24-pint hallocks, 6⅜ inches deep, 13¾ inches wide, and 19¼ inches long, all inside measurements. Half inch center piece. Size of hallocks 2½ x 4⅜ x 4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches."

Plaintiff alleges that for many years past it has been [fol. 40] engaged in the business of manufacturing in the State of California containers for strawberries and raspberries, made of two thin strips of wood crossing each other to form the bottom and bent upwards to form the sides, reinforced with a narrow metal strip to protect the baskets and the contents, and to insure uniformity of cubic measure. When constructed, the containers have an opening to insure ventilation, and a cubic content of one pint. That for the past nine years the plaintiff has sold its containers to dealers in the State of Oregon in large quantities, and they are in common use throughout the United States. That the type of containers mentioned in the orders must be made from spruce grown only in the Northwest, and cannot be manufactured by plaintiff without expensive change in its machinery. That the orders when enforced will prevent plaintiff from selling its containers in Oregon, although they have the same cubic content and provide the same or better protection for fruit than the standard containers. That there is no necessity for the orders based upon consideration of public health, or to prevent fraud or deception or other than legitimate use of the police power. That said orders were made and promulgated arbitrarily, capriciously

and without justification, and are void because they deprive plaintiff of its property without due process of law and without equal protection of the law, and that the orders are void because they interfere with and impose unlawful burdens on interstate commerce and the business of plaintiff, in violation of the constitution of the United States.

The matter is before the court on plaintiff's motion for an interlocutory injunction and defendants' motion to dismiss the bill of complaint on the ground that it does not state facts sufficient to entitle plaintiff to the relief demanded.

In Oregon large quantities of strawberries and raspberries are raised and sold in local and distant markets. Success of this industry is not only vital to a large number of growers, but has an important bearing on the economic life of the state.

It is a matter of general knowledge that enforced standardization of containers is essential to the economic handling, shipping and selling of horticultural products, for, [fol. 41] among other reasons, it prevents fraud and deception in sales, provides the best method of stowage, and eliminates many sizes that complicate the problems of transportation.

Legislation designed to aid and promote the industry in the manner provided by the Oregon laws falls within the legitimate use of the police power of the state.

The issue tendered as to the necessity of such legislation, based upon considerations of public health or to prevent fraud or deception, was effectively answered by the legislature in passing laws authorizing and empowering the Department of Agriculture to fix and promulgate standard containers, and making noncompliance therewith a misdemeanor, and its determination will not be interfered with by this court unless it plainly appears that the constitutional rights of plaintiff have been violated.

Schmidinger v. Chicago, 226 U. S. 578, involved the validity of an ordinance of the City of Chicago fixing weight standards for loaves of bread. The court said:

"This court has frequently affirmed that the local authorities entrusted with the regulation of such matters and not the courts are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursu-

ance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred. Jacobson v. Massachusetts, 197 U. S. 11; Mugler v. Kansas, 123 U. S. 623; Minnesota vs. Barber, 136 U. S. 313, 320; Atkin v. Kansas, 191 U. S. 207, 223; McLean v. Arkansas, 211 U. S. 539."

Powell v. Pennsylvania, 127 U. S. 678, was a suit to test the validity of a statute of Pennsylvania relating to the manufacture and sale of oleomargarine butter. The court said (p. 686):

"The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

Price v. Illinois, 238 U. S. 447;
[fol. 42] Hebe Co. v. Shaw, 248 U. S. 297;
Radice v. New York, 264 U. S. 292;
Insurance Co. v. Glidden Co., 284 U. S. 151.

The containers are so unlike in design, strength and material used that it requires skill and experience in the handling and shipping of fruit to compare intelligently their respective advantages. It is presumed that the authorized legislative agency fully and fairly considered all the facts relating to the merits of the containers manufactured by plaintiff, as well as those adopted as the standards, and its determination as culminate in the orders was a finding that

the standards so fixed were better adapted to carry out the beneficial objects of the legislation.

Whether the Department of Agriculture acted wisely in making its selections, or whether the containers manufactured by the plaintiff are as well or better adapted to the intended use, does not present a subject for judicial review. The power of this court to adjudicate matters of that nature is limited to cases where it appears from the facts alleged that the orders are so clearly arbitrary and discriminatory as to invade the rights secured to plaintiff by the organic law. Facts essential to raise such an issue do not appear in the record.

It is contended that the orders are void because they interfere with and impose unlawful burdens on interstate commerce and the business of plaintiff.

There is nothing in the law which would indicate that the Oregon Legislature intended to encroach upon the exclusive powers of Congress to regulate interstate commerce, but on the contrary the law expressly excludes from its operation products brought from outside the state and offered for sale or consignment in the original packages. However, the plaintiff will not be denied the right to ship its containers through the channels of interstate commerce, for the orders will not affect the containers until they have lost their character as such commerce and have been sold to dealers and used in the selling and shipping of fruit.

The commerce clause of the United States Constitution protects only that which is the subject of interstate commerce and transported over lines of interstate communication. When the property arrives in the state of its destina- [fols. 43 & 44] tion, and passes from the importer to the buyer to be used in intrastate trade, it ceases to be an article of interstate commerce and becomes a part of the general property of the state and amendable to its laws.

The question when the paramount power of congress terminates and that of the state begins came directly before the Supreme Court of the United States for the first time in the case of Brown v. Maryland, 12 Wheat. 419, and the court, through Mr. Chief Justice Marshall, held that an article authorized by a law of congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was im-

ported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no state, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign ocmmerce, and became subject to the laws of the state, and might be taxed for state purposes, and the sale regulated by the state, like any other property.

This ruling has been followed in many later cases.

The motion for an interlocutory injunction will be denied, and the motion to dismiss will be allowed.

[File endorsement omitted.]

[fols. 45 & 46] In United States District Court

[Title omitted]

Order Denying Interlocutory Injunction—Filed Dec. 21, 1934

This matter having come on regularly for hearing by a statutory court of three judges, consisting of Honorable Francis A. Garrecht, Honorable John H. McNary, and Honorable James Alger Fee, upon plaintiff's application for an interlocutory injunction, and upon defendants' motion to dismiss plaintiff's amended bill of complaint herein upon the ground that said amended bill of complaint does not state facts sufficient to entitle the plaintiff to the relief therein demanded, and that there is no equity in the bill; the court having heard the argument of counsel for and on behalf of plaintiff and of counsel for and on behalf of the defendants, and having examined briefs submitted for the respective parties, and being now fully advised in the premises.

It is hereby ordered that plaintiff's application for an interlocutory injunction be and the same hereby is denied.

It is hereby further ordered that plaintiff's bill of complaint herein be and the same hereby is dismissed.

John H. McNary, Judge.

[File endorsement omitted.]

[fols. 47 & 48] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. E-9443

PACIFIC STATES BOX AND BASKET COMPANY, a California corporation, Plaintiff,

vs.

MAX GEHLHAR, as Director of Agriculture for the State of Oregon, and CHAS. A. COLE, as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, Defendants

FINAL DECREE—Filed Feb. 27, 1935

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof,

It is hereby ordered, adjudged and decreed that Plaintiff's prayer for a permanent injunction be and the same is hereby denied and Plaintiff's suit be and the same is hereby dismissed.

John H. McNary, Judge.

Dated Feb. 27, 1935.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Marion County Oregon on this 19th day of January, 1935.

Willis S. Moore, of Attorneys for Defendants.

[File endorsement omitted.]

[fol. 49] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed March 18, 1935

To the Honorable Judges of the District Court of the United States for the District of Oregon:

Your petitioner, Pacific States Box and Basket Company, a corporation, respectfully shows: That heretofore your petitioner filed its bill of complaint and thereafter on stipulation with Defendants and the approval of this Court, filed its amended bill of complaint, said amended bill of complaint asking that Defendants be enjoined from enforcing certain orders issued and promulgated by them as officials of the State of Oregon and to enjoin the enforcement of certain statutes of the State of Oregon, on the ground that said orders were unconstitutional. In said original bill of complaint, Plaintiff prayed for a temporary restraining order which was granted and in said bill of complaint and in the amended bill of complaint, an interlocutory injunction was asked for. Thereafter the hearing on the interlocutory injunction and upon Defendants' motion to dismiss Plaintiff's bill on the ground that said bill did not state facts sufficient to entitle Plaintiff to the relief demanded and that there was no equity in the bill, came on for hearing before a statutory court of three judges consisting of Honorable John H. McNary and James A. Fee, District Judges, and Honorable Francis A. Garrecht, a judge of the Circuit Court of Appeals. After the presentation of all arguments and the filing of briefs by the parties, an opinion was rendered by said three-judge court denying plaintiff's application for an interlocutory injunction and granting Defendants' motion for a dismissal of Plaintiff's bill. Thereafter and on or about December 21, [fols. 50 & 51] 1934, the statutory court of three judges entered its order that Plaintiff's application for an interlocutory injunction be denied and further ordered that Plaintiff's bill of complaint be dismissed. Thereafter, and on February 27, 1935, the said court entered a final decree denying Plaintiff's prayer for a permanent injunction and dismissing the above entitled suit.

The said order denying Plaintiff's application for an injunction and granting Defendants' motion to dismiss Plaintiff's amended bill, and the said final decree denying Plaintiff's prayer for a permanent injunction and dismissing the above entitled suit are greatly to the prejudice and injury of Plaintiff and are erroneous and inequitable.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignments of Error, filed with the Clerk pursuant to Rule 9 of the Rules of the United States Supreme Court; and there has been likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays for the allowance of an appeal in said cause to the Supreme Court of the United States agreeably to the statutes and rules of said court in such cases made and provided, and that a proper order touching the security required of the petitioner be made.

Arthur A. Goldsmith, Byron C. Hanner, Solicitors for Petitioner.

Dated March 18, 1935.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed March 18, 1935

Comes now Pacific States Box and Basket Company, plaintiff and appellant in the above entitled cause, and files the following Assignment of Errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the interlocutory order of this Court entered on December 21, 1934, and from the final decree denying plaintiff's prayer for a permanent injunction and dismissing the above entitled suit, which final decree is dated February 27, 1935.

I

The Court erred in refusing to enjoin the defendants and their successors in office in their official capacities as heads of the Department of Agriculture for the State of Oregon, from enforcing orders of said Department fixing standard containers for strawberries and raspberries, which orders provided that the standard containers for such berries shall be: "Raspberries: Crate—24-pint hallocks, 5⅛ inches deep, 16⅝ inches wide, and 23¼ inches long, all inside measurements. Center partition ¾ inches, ends and partition grooved for double deck. Size of hallock, 2x5¼x5¼ inches, outside measurements. Bottom set up ¾ inch, inside depth 1¼ inches." "Strawberries: Crate—24-pint hallocks, 6⅜ inches deep, 13¾ inches wide, and 19¼ inches long, all inside measurements. Half inch center piece. Size of hallocks, 2½x4⅜x4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches." The first of these orders was dated May 3, 1933, and entitled "Standard Containers for Fruits and Vegetables" and the other order was dated June 1, 1933, and entitled "Oregon Standards for Strawberries (1933)", the material parts of said orders [fol. 53] so far as they relate to raspberries and strawberries being the same. Said orders are attached to and made a part of Plaintiff's amended bill of complaint as Exhibit-A and B thereof.

II

The Court erred in failing to enjoin the enforcement of Section 18-2902 and Section 18-2911, Oregon Code of 1930 (the official publication and compilation of the general laws of Oregon) and Section 3 and Section 8 of Chapter 225, Oregon Laws of 1933 (which was officially published by the State of Oregon under such title) insofar as they purport to sustain the orders mentioned in Assignment of Errors No. I and make the violation thereof unlawful and punishable. These statutory provisions are set forth in full in Paragraph IV of plaintiff's amended bill of complaint.

III

The Court erred in failing to hold that the orders in question are arbitrary, capricious and unlawful as they relate to strawberry and raspberry containers.

IV

The Court erred in refusing to hold that the said orders above referred to and the statutory provisions under which they were issued, insofar as they relate to strawberry and raspberry containers, were void as being in conflict with Section 1 of the 14th Amendment of the Constitution of the United States, and in failing to hold that said orders deprive Plaintiff of its property without due process of law.

V

The Court erred in failing to hold that said orders and statutory provisions above referred to, insofar as they relate to strawberry and raspberry containers, were void and were in conflict with Section 1 of the 14th Amendment of the Constitution of the United States in that they deprive Plaintiff of the equal protection of the law.

VI

The Court erred in refusing to hold that said orders and the statutory provisions above referred to were void and were in conflict with sub-section 3 of Section 8 of Article 1 of the Constitution of the United States in that they interfere with and impose unlawful burdens on the interstate commerce and business of the Plaintiff.

[fol. 54]

VII

The Court erred in refusing to hold that the orders above mentioned and the statutory provisions above set forth, insofar as they purport to sustain such orders, relating to raspberry and strawberry containers, are violative of the constitutional rights of plaintiff.

VIII

The Court erred in failing to find the facts specially and to state separately its conclusions of law thereon, as provided in Federal Equity Rule No. 70½.

IX

The Court erred in denying plaintiff's application for an interlocutory injunction enjoining the enforcement of the orders and statutory provisions cited in Assignment of

Errors No. I and II hereof, in that the amended bill of complaint and the supporting affidavits were not denied, and said amended bill of complaint and affidavits set forth facts showing the said orders and statutory provisions, in question, to be unconstitutional.

X

The Court erred in granting defendants' motion to dismiss plaintiff's amended bill of complaint in that said amended bill of complaint did state sufficient facts to warrant the issuance of an injunction against the orders and statutes, which were clearly shown to be unconstitutional.

XI

The Court erred in entering a final decree dismissing plaintiff's suit and denying its application for a permanent injunction in that such action was taken without the introduction of any testimony, and where the record consisted of plaintiff's amended bill of complaint and uncontradicted affidavits in support of its application for an injunction, which amended bill of complaint alleged sufficient facts to warrant the conclusion that the orders were clearly arbitrary, unreasonable and capricious, and therefore unconstitutional and void.

Prayer for Reversal

For errors and reasons aforesaid, said plaintiff and appellant, Pacific States Box and Basket Company, prays that the said interlocutory order and final decree of the statutory three-judge District Court of the United States for [fols. 55-64] the District of Oregon in said cause be reversed and the case remanded with instructions to grant the injunction prayed for, with costs.

Respectfully submitted, Arthur A. Goldsmith, Byron C. Hanna, Solicitors for Appellant.

[File endorsement omitted.]

[fols. 65 & 66] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 18, 1935.

The petition of Pacific States Box and Basket Company, the complainant in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the District of Oregon, having been filed herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this Court and the record in this cause having been considered:

It is hereby ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the interlocutory decree of the District Court of the United States for the District of Oregon entered in this cause on the 21st day of December, 1934, and from the final decree of said District Court of the United States for the District of Oregon, which final decree was entered in this cause on the 27th day of February, 1935, and that the Clerk of the said District Court of the United States for the District of Oregon shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his oath and the seal of the Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of $500.00 conditioned as required by law.

Done by Court this 18th day of March, 1935.

(Sgd.) John H. McNary, District Judge.

[File endorsement omitted.]

[fols. 67-71] Bond on Appeal for $500.00, approved and filed March 20, 1935, omitted in printing.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted.]

PRAECIPE FOR TRANSCRIPT OF RECORD.—Filed March 23, 1935

To Mr. G. H. Marsh, Clerk of the above entitled Court:

In preparing the record on appeal in the above entitled cause, you are directed to incorporate therein the following papers:

1. Plaintiff's amended bill of complaint and exhibits.
2. Stipulation dated June 15, 1934, allowing filing of amended bill of complaint, but omitting copy thereof.
3. Affidavit of Herman Paine dated May 29, 1934, with exhibits thereto.
4. Affidavit of Herman Paine dated June 15, 1934, with exhibits thereto.
5. Notice of hearing on plaintiff's application for interlocutory injunction.
6. Defendants' motion to dismiss.
7. Opinion of statutory three-judge Court.
8. Order of December 21, 1934, denying plaintiff's application for interlocutory injunction and granting defendants' motion to dismiss.
9. Final decree dated February 27, 1935.
10. Petition for appeal.
11. Order allowing appeal.
12. Citation on appeal, and record of proof of service thereof.
13. Bond on appeal and approval thereof.
14. Assignment of errors and prayer for reversal.
15. Statement of jurisdiction.

[fol. 73] 16. Proof of service and notice directing attention to provisions of Rule 12, paragraph 3.

Arthur A. Goldsmith, Byron C. Hanna, Solicitors for appellant.

Service of a copy of the above præcipe acknowledged this 21st day of March, 1935.

Willis S. Moore, of Solicitor for appellees.

[File endorsement omitted.]

[fol. 74] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 75] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed May 9, 1935.

Comes now the Appellant and adopts its Assignment of Errors as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated May 2, 1935.

Arthur A. Goldsmith, Byron C. Hanna, Counsel for Appellant.

Service acknowledged, this 3rd day of May, 1935.

Willis S. Moore, of Counsel for Appellees. Address: Salem, Oregon.

[fols. 76 & 77] [File endorsement omitted.]

Endorsed on cover: File No. 39,583. Oregon, D. C. U. S. Term No. 48. Pacific States Box and Basket Company, Appellant, vs. Max Gehlhar, as Director of Agriculture for the State of Oregon, et al. Filed May 9, 1935. File No. 48 O. T. 1935.

(6554-C)